



COMMONWEALTH of VIRGINIA
CHESAPEAKE BAY LOCAL ASSISTANCE DEPARTMENT

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Mr. Joe Lerch
Chesapeake Bay Foundation
1108 East Main Street, Suite 1600
Richmond, Virginia 23219

Re: October 23, 2003 Request for Regulation Interpretation

Dear Joe:

This is in response to your email inquiry regarding wetlands and stream restoration as water dependent facilities, particularly as applied to proposed Bay Act ordinance amendments for the Town of Herndon. First, let me assure you that CBLAD staff consider wetlands restoration and creation, stream restoration, and streambank stabilization to be important in improving water quality. However, we do not consider the current Regulation language to provide for these activities to be permitted by right. We are concerned that simply declaring them to be water-dependent and, therefore, permitted by right, without sufficient description and conditions, may result in less than acceptable projects to be constructed under the banner of resource improvement. We have discussed the issue at length and have formed the question and response as noted below.

Are wetlands restoration, wetlands creation, stream restoration and streambank stabilization projects considered as water dependent facilities and therefore permitted by right within Resource Protection Area?

1. The Department has, since 1990, advised applicable local governments that the creation of wetlands should be considered under an exception application including the review of a water quality impact assessment. The creation of wetlands is a fairly uncommon occurrence and the Department believes that while such an activity should be beneficial to water quality, it also should undergo additional review. Finally, when new wetlands are created, and if those wetlands are connected and contiguous to tidal wetlands, tidal shores or water bodies with perennial flow, then the RPA must be expanded to include these features along with a 100-foot vegetated buffer area at the landward of the edge of the new wetland area.

2. Wetland restoration projects are similar in that they do not occur frequently, require additional state and federal permits and review, and require that a WQIA be submitted and reviewed as part of the consideration of such projects. The Department's concern is that there is no definition in the Regulations for "wetlands restoration" projects, and no mention of such an activity as a permitted activity under the current Regulations. The Department believes that, pursuant to the current regulations, these projects should also be evaluated on a case-by-case basis under a local exception process to ensure that adequate review and conditions are required to assure water quality protection and improvement.
3. Up to now, the Department has addressed stream restoration projects only as part of an overall local stormwater management plan that the Local Assistance Board has approved (specifically, at the request of Henrico County) and which, under the current Regulations, would allow for stream restoration activities to occur in the RPA. The Department, in this case, was able to evaluate the proposed restoration activities in the context of sediment reduction and as part of an overall stormwater program that included funding for such projects, design criteria and local review and approval. As with wetlands restoration, the Department is concerned about the lack of any definition for stream restoration projects and the possibility of such a class of activity exceeding the intended scope. Therefore, Department believes that stream restoration projects may either be considered under an overall local stormwater management/Watershed plan/program that has been reviewed and approved by CBLAB or should be evaluated on a case-by-case basis through the local exception process, including the requirement for a water quality impact assessment, to ensure that adequate review and conditions are required to assure water quality protection and improvement.
4. The Department also believes that streambank stabilization projects may be permitted by right only if such activities are included as part of a local flood control program or local stormwater management program as outlined under the requirements in 9 VAC 10-20-130.1.e of the Regulations. Any other streambank stabilization project would also be required to be considered on a case-by-case basis as an exception and include the submission of a water quality impact assessment to ensure that adequate review and conditions are required to assure water quality protection and improvement.
5. As you know, shoreline erosion control is specifically addressed in the regulations already. The Department has interpreted this activity to be water dependent. However, even though such projects may be reviewed administratively by local government staff, the Department still requires that a WQIA be submitted because this is an activity conducted within the RPA. We have also coordinated with other agencies involved in the Joint Permit Application process, and these activities will now be identified in the new JPA as activities within the RPA that must also be reviewed by the local government.

Once again, the Department recognizes that the first four activities discussed above are ones that should result in significant improvements to the natural resource base and provide water quality improvements once completed. You may recall that Mike Rolband discussed these activities during the ad hoc perennial stream protocol meetings. He suggested that these are activities that should be encouraged by CBLAD and considered water-dependent, in order to more easily allow them, rather than discourage such projects due to the administrative burdens associated with extensive review and approval procedures. CBLAD staff agree with this concept, but we also believe that the regulations need to address these issues more specifically and provide reasonable but important conditions to assure that such projects are done in a manner that will indeed enhance the resource and water quality. In that regard, we will reevaluate these issues in the next regulatory review process (beginning summer 2004). If you have any further questions about these interpretations, don't hesitate to contact me.

Sincerely,

Scott Crafton

C: Martha Little
Catherine Harold
Shawn Smith
Heather Mackey